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No. 215

# In the Supreme Court of the United States

OCTOBER TERM, 1958

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SAMUEL GOLDSTEIN, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

***On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit***

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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J. LEE RANKIN,
*Solicitor General,*

CHARLES K. RICE,
*Assistant Attorney General,*

A. F. PRESCOTT,
MELVIN L. LEBOW,
*Attorneys,*
*Department of Justice,*
*Washington 25, D. C.*

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### OPINIONS BELOW

The memorandum opinion of the District Court (R. 48) is not officially reported. The *per curiam* opinion of the Court of Appeals (Pet. 30-31) is not yet officially reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1958. (Pet. 32.) The petition for a writ of certiorari was filed on July 24, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## QUESTIONS PRESENTED

1. Whether a federal tax lien attaching to a cause of action and to the proceeds thereof belonging to a delinquent taxpayer is prior to an attorney's lien attaching later to the same property, where the attorney's lien is contingent as to amount and not reduced to judgment at the time the federal lien attached and was filed.

2. Whether an attorney under a retainer agreement with a delinquent taxpayer, whereby the taxpayer agreed to pay and assign to the attorney as compensation for future services a percentage of the award that might result upon the outcome of an action to which a federal tax lien attached, is a "purchaser" within the meaning of Section 6323(a) of the 1954 Code.

## STATUTES INVOLVED

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

[26 U.S.C. 1952 ed., Supp. V, Sec. 6321.]

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the

time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

[26 U.S.C. 1952 ed., Supp. V, Sec. 6322.]

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under state or territorial laws.*—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; * * *

* * * *

[26 U.S.C. 1952 ed., Supp. V, Sec. 6323(a).]

New York Judiciary Law (29 McKinney's Consolidated Laws of New York Annotated):

SEC. 475. *Attorney's lien in action, special or other proceeding*

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing counterclaim, the attorney who ap-

pears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

## STATEMENT

Pay-O-Matic Corporation is a delinquent taxpayer owing the United States withholding taxes for the years 1954 and 1955. (R. 48.) The taxes were assessed against the taxpayer on August 15, 1955, and November 15, 1955, in the respective amounts of $6,497.42 and $4,388.83. (R. 6.) The total amount outstanding on these assessments is $6,213.19 (R. 6), and the amount of the fund in question in this case is $4,569.28 (R. 48).

On August 5, 1955, the City of New York became vested with title to certain trade fixtures of the taxpayer as part of a condemnation proceeding. (R. 48.) Subsequently, on November 18, 1955, the petitioner was retained by the taxpayer to represent it in the condemnation suit. The written retainer provided (R. 56):

> PAY-O-MATIC CORPORATION hereby retains SAMUEL GOLDSTEIN & SONS as its attorneys to represent it in the * * * proceeding, and agrees to pay and hereby assigns to said attorneys, for their services twenty-five (25%) per cent of any award * * * that may be made * * *.

Said attorneys' compensation is to be paid when the award is paid by the City.

A notice of lien for professional services was filed by the petitioner on November 22, 1955. (R. 48.)

On December 12, 1955, a notice of federal tax lien for $11,629.44 was properly filed in the office of the Register of New York County. On April 5, 1956, a notice of levy was filed with the Comptroller of the City of New York for $5,262.64 due from the taxpayer for withholding taxes for all of the year 1955, to attach to any funds due taxpayer for the property taken by the city. On June 27, 1956, an amended notice of federal tax lien was filed for $11,882.43 in the Register's office and with the Comptroller. (R. 48.)

A final decree was entered on August 22, 1956, in the Supreme Court of the State of New York, County of New York, in the condemnation proceeding awarding the taxpayer a total of $4,569.28 as compensation for the property taken by the city. (R. 48.)

Subsequently, on April 30, 1957, the petitioner moved the Supreme Court of the State of New York for an order determining, fixing, and enforcing his attorney's lien in the sum of $1,294.32. (R. 25, 37, 55.)

On June 6, 1957, this action was commenced by the United States pursuant to 28 U.S.C., Section 1345, to enforce collection of its tax lien in the total unpaid amount of $9,669.03, together with interest and penalties. (R. 5, 6.) Pursuant to motion by the United States, the District Court enjoined the City of New York from paying out any part of the award until determination of this action, and it also enjoined all

parties from proceeding further against the award. (R. 31-32.) Only the petitioner appeared in the present action (R. 48), and both the United States and the petitioner moved for summary judgment. The District Court granted the Government's motion, denied the petitioner's motion, and entered judgment for the United States. That court held that the United States, by virtue of its tax liens, had rights prior to those of the petitioner. (R. 48.) The Court of Appeals, *per curiam*, affirmed the judgment of the District Court. (Pet. 30-31.)

## ARGUMENT

The decision of the court below is in accord with numerous decisions of this Court. There is no conflict or other reason for further review.

1. Involved here is the question of relative priorities as between the lien of the United States for unpaid withholding taxes and an attorney's lien which exists by virtue of Section 475 of the New York Judiciary Law, *supra*, pp. 3-4.

Section 6321 of the Internal Revenue Code of 1954, *supra*, p. 2, imposes a lien "in favor of the United States upon all property and rights to property, whether real or personal," belonging to the delinquent taxpayer. Except as to the lien of a mortgagee, pledgee, purchaser, or judgment creditor,[1] a tax, when assessed, constitutes a fully perfected lien in favor of the United States as against all other subsequent liens.

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[1] As to those specific categories, the federal tax lien must be filed in order to constitute a valid lien. Section 6323(a), Internal Revenue Code of 1954, *supra*, p. 3.

or prior inchoate liens, whether filed or unfiled. *United States* v. *Vorreiter*, 355 U. S. 15; *United States* v. *White Bear Brewing Co.*, 350 U. S. 1010, *United States* v. *Colotta*, 350 U. S. 808; *United States* v. *Scovil*, 348 U. S. 218; *United States* v. *Acri*, 348 U. S. 211; *United States* v. *New Britain*, 347 U. S. 81; *United States* v. *Gilbert Associates*, 345 U. S. 361; *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47; Sections 6321 and 6322, Internal Revenue Code of 1954, *supra*, pp. 2-3.

Accordingly, in this case the federal tax lien attached, fully perfected on August 15, 1955,[2] to the cause of action belonging to the delinquent taxpayer which arose by virtue of the condemnation of its property by the City of New York, and also subsequently attached to the award given the taxpayer by virtue of the condemnation proceedings. (R. 4, 10, 37, 48.) Under local law, the petitioner's attorney's lien attached to the same property. Section 475, New York Judiciary Law. The petitioner, citing state cases (Pet. 7-8, 16-17, 22) which apply local law, claims that his lien should be accorded priority over the lien of the United States.

It is well-settled that the relative priority of the

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[2] This lien arose by virtue of the assessment of August 15, 1955. (R. 6.) Subsequently, the amount of the lien was enlarged by virtue of assessments for additional tax on November 15, 1955. (R. 6, 48.) In point of time, the petitioner's lien attached subsequent to the federal tax lien—the contract of retainer not being executed until November 18, 1955 (R. 56)— and, as the petitioner recognizes (Pet. 21), the doctrine of relation-back does not apply here. *United States* v. *Security Tr. & Sav. Bk.*, *supra*, p. 50.

lien of the United States for unpaid taxes is a federal question, and that the state's characterization of its liens, while good for all local purposes, is not controlling.[3] *United States* v. *Acri*, *supra*, p. 213; *United States* v. *Security Tr. & Sav. Bk.*, *supra*, pp. 49-50; *United States* v. *Bess*, 357 U. S. 51, 56-57; *United States* v. *Waddill Co.*, 323 U. S. 353, 356-357. A local lien which is contingent upon the taking of further steps for enforcement is, for federal tax purposes, unperfected or inchoate, and therefore subordinate to the federal tax lien.[4] *Illinois* v. *Campbell*, 329 U. S. 362, 375; *United States* v. *Security Tr. & Sav. Bk.*, *supra*, p. 51; *United States* v. *Scovil*, *supra*, p. 220; *United States* v. *Acri*, *supra*, p. 214; *United States* v. *New Britain*, *supra*, p. 84.

These principles clearly accord priority to the Government's lien here. Under the law of the state, the attorney's lien, which arises as a result of his services in an action, attaches to the cause of action and to any award given his client as a result of the action. The lien under state law relates back to the time the cause of action was commenced. Section 475, New

[3] The petitioner's suggestion (Pet. 15-16, 18-19) that the statute is unconstitutional is without merit. The constitutionality of the statute and its rule was settled by *Michigan* v. *United States*, 317 U. S. 338, 340. The petitioner's reliance (Pet. 9-15) upon *Commissioner* v. *Stern*, 357 U.S. 39, is also without merit. See *United States* v. *Bess*, *supra*, pp. 54, 57.

[4] An attorney's lien is subject to the same principles applicable to any other state created liens in determining the relative priority of the lien of the United States for unpaid taxes. *First State Bank of Medford* v. *United States* (Minn.), decided July 11, 1958 (58-2 U.S.T.C., par. 9758), citing *United States* v. *Ball Construction Co.*, 355 U.S. 587.

York Judiciary Law. This lien, however, is wholly contingent upon, among other things, the attorney's or his client's petitioning the court to determine and enforce it. Section 475, New York Judiciary Law. The petitioner here did not reduce his lien to judgment. Moreover, he did not seek to take the steps necessary to determine, fix, and enforce his lien until subsequent to the time when a final decree was entered in the condemnation proceeding. At that time the federal tax lien had already attached and was properly filed. (R. 25, 37, 48.) Therefore, the petitioner's lien, which could not have become perfected until subsequent to the date the federal lien had attached and notice thereof filed, cannot displace the federal lien. *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215, 217; *United States* v. *Security Tr. & Sav. Bk.*, *supra*, p. 50.

2. The petitioner's contention (Pet. 23-28) that at the time of the execution of a retainer agreement between himself, as attorney, and the delinquent taxpayer, as client, he became a "purchaser" within the meaning of Section 6323(a) of the Internal Revenue Code of 1954, *supra*, p. 3, is also without merit. Section 6323(a) in effect accords priority to the lien of a mortgagee, pledgee, purchaser, or judgment creditor over federal tax liens which are unfiled at the time the former liens became such. In this case, the federal liens arose on August 15, 1955, and Novem-

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[1] See for example, *Matter of Cooper (McCauley)*, 291 N.Y. 255; *Matter of Anderson* v. *U. S. Fidelity & Guaranty Co.*, 238 App. Div. 48; *Matter of Beckett*, 112 Misc. 45.

ber 15, 1955. (R. 6.) Subsequently, the retainer was executed on November 18, 1955, and the federal tax lien was filed on December 12, 1955 (R. 48). The petitioner argues (Pet. 23) that "The Notice of Federal Tax Lien here was filed * * * after Petitioner received title as a 'purchaser' on * * * the date he was retained November 18, 1955", and therefore his interests are prior to those of the United States.

Where, as here, a federal lien has attached to property belonging to a taxpayer, federal law[11] determines the character of any claim of right or interest in such property which is adverse to the federal lien. *United States* v. *Bess*, 357 U. S. 51; *Poe* v. *Seaborn*, 282 U. S. 101; *Fidelity & Deposit Co.* v. *New York City Housing Auth.*, 241 F. 2d 142 (C.A. 2d); *United States* v. *Hoper*, 242 F. 2d 468 (C.A. 7th); *United States* v. *Hawkins*, 228 F. 2d 517 (C.A. 9th). Under federal law, a "purchaser" is one who acquires title for a valuable present consideration in the manner of vendor and vendee. *United States* v. *Scovil*, *supra*, pp. 220-221; *Marteney* v. *United States*, 245 F. 2d 135, 138 (C. A. 10th); *United States* v. *Hoper*, *supra*, pp. 470-471; *United States* v. *Hawkins*, 228 F. 2d 517, 519 (C. A. 9th). An attorney under a retainer agreement for future services is not, in the normal sense of the term, a vendee. Indeed, the retainer contract here explicitly provides that it is an agreement providing "compensation" for services (R.

[11] It should be noted here that even under state law the petitioner was not a purchaser. See fns. 7 and 8, *infra*, pp. 11-12.

56); it is in all respects a contract for services and not one of purchase and sale in the ordinary sense.[7]

Moreover, if a service contract could be likened to a sale—which it is not, even under the applicable local law (see fn. 7)—the retainer agreement here provided that the delinquent taxpayer would pay for services of the petitioner to be performed in the future, and that the compensation was to be paid from a fund not in existence; in no event was the petitioner to receive compensation until the future fund or award was paid by the city. (R. 56; see R. 36, 40, 48, 53.)[8] Hence, at the time the federal tax lien was filed in December, 1955 (R. 48), and fully protected as against purchasers, the retainer was inchoate

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[7] The New York cases—adopting a somewhat similar approach in that they recognize the essential character of a transaction as determinative of the question as to whether a contract is one of sale—hold that a service contract is not a sale. *Carlson, Holmes & Bromstad, Inc.* v. *Stewart & Co., Inc.*, 117 Misc. 607, 608, affirmed without opinion, 246 App. Div. 522; *Haag* v. *Klee*, 162 Misc. 250; *Racklin-Fagin Construction Corp.* v. *Villar*, 156 Misc. 220; *City Title Ins. Co.* v. *Traub*, 116 N.Y.S. 2d 35.

[8] Indeed, under local law no sale occurred upon the execution of the contract, and certainly there was no present transfer of title to property. Section 86(3), New York Personal Property Law (40 McKinney's Consolidated Laws of New York Annotated). See, for example, *Bulldog Electric Prod. Co.* v. *Cole Electric Prod. Co.*, 134 F. 2d 545, 547 (C.A. 2d). Further, under New York law the taxpayer could cancel the retainer at any time without being subject to a suit for breach of contract. *Matter of Weitling*, 266 N. Y. 181; *Levine* v. *Levine*, 206 Misc. 884. Obviously, the taxpayer did not transfer title to anything to the petitioner under the retainer agreement.

and unperfected—not falling within the protection of Section 6323(a) of the 1954 Code. *United States* v. *Ball Construction Co., supra.*

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
*Solicitor General.*

CHARLES K. RICE,
*Assistant Attorney General.*

A. F. PRESCOTT,
MELVIN L. LEBOW,
*Attorneys.*

SEPTEMBER, 1958.